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The Fourteenth Amendment and Prisons: A New Look at Due Process for Prisoners

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THE FOURTEENTH AMENDMENT AND PRISONS: A NEW LOOK AT DUE PROCESS FOR PRISONERS

In the past, correctional authorities exercised nearly absolute power in the operation of this nation's prisons and were vested with total discretion over the treatment of prisoners within the institutions. Recently, however, there has been a resurgence of public concern over the manner in which our correctional systems are maintained. At the same time, the courts, recognizing the need to scrutinize more closely the way in which inmates are treated, have departed from the "hands-off" doctrine by which they traditionally deferred to the discretion of institutional authorities when confronted with prison cases.[1] As a result, it is now recognized that prison officials have at least a limited duty to protect the rights of inmates in their charge.

There has also been a recent judicial tendency to enforce relatively strict procedural due process requirements in nonjudicial, or administrative, proceedings. The United States Supreme Court has held that due process is required in a variety of these nonjudicial settings and has set forth the specific due process requirements to be applied.[2] The most important of these cases, *Morrissey v. Brewer*,[3] held that before parole may be revoked the parolee is to be provided with written notice of the claimed violation, an opportunity to be heard and to present documentary evidence, and the right to confront and cross-examine adverse witnesses (unless good cause is shown). In addition, he is entitled to appear before a neutral and detached hearing body and to receive a written statement as to evidence relied on and the reasons for the revocation.[4] These requirements were held applicable to probation revocation in *Gagnon v. Scarpelli*,[5] with the added statement by the Court that counsel should be provided when the probationer claims

1. 50 TEXAS L. REV. 155, 157 (1971). See text accompanying note 124 *infra*.

2. Gagnon v. Scarpelli, 411 U.S. 778 (1973); Perry v. Sindermann, 408 U.S. 593 (1972); Morrissey v. Brewer, 408 U.S. 471 (1972); Fuentes v. Shevin, 407 U.S. 67 (1972); Bell v. Burson, 402 U.S. 535 (1971); Wisconsin v. Constantineau, 400 U.S. 433 (1971); Wheeler v. Montgomery, 397 U.S. 280 (1970); Goldberg v. Kelly, 397 U.S. 254 (1970).

3. 408 U.S. 471 (1972).

4. *Id.* at 487-89.

5. 411 U.S. 778 (1973).

that he did not commit a violation of probation conditions or that there were mitigating circumstances which would be difficult for the probationer to present unaided.[6]

Recent judicial cognizance of prison problems, coupled with the imposition of due process requirements in nonjudicial proceedings, has resulted in confusion surrounding prisoners' procedural rights.[7] The lower federal courts, relying on the administrative cases in determining what process was due in prison disciplinary hearings, handed down an ill-sorted group of decisions requiring different due process protections in substantially similar cases.[8]

In an attempt to establish a definitive set of guidelines and to settle the disparate results reached by the lower federal courts, the United States Supreme Court in 1974 confronted the due process problem in the context of prison disciplinary proceedings in *Wolff v. McDonnell*.[9] Basically, the Court rejected the necessity of many of the strict protections required in parole and probation revocation hearings, calling instead for a balancing of the state's interest in orderly disciplinary hearings with that of the inmate in obtaining a just resolution of the proceedings against him. With the exception of a strict notice provision, the constitutionally required protections set out by the *Wolff* Court rest entirely on the discretion of the prison authorities in their capacity as guardians of institutional security and correctional goals; the Court drew no express limitations on the exercise of this discretion.

This note presents the view that the minimum due process requirements set forth in *Wolff* are constitutionally deficient and that the balancing of interests approach used by the Court is both faulty and impractical and will stimulate unnecessary litigation. It will be demonstrated that a sounder approach to the resolution of the due process problem in prison disciplinary hearings is to determine first the function or objective of the hearings—the substantive nature of the inquiry—and the usefulness of the particular safeguard being considered in light of that objective.[10] When the *right* to such safeguards as have been deemed appropriate has been extended to the prisoner, then the com-

6. *Id.* at 790.

7. 50 TEXAS L. REV. 155, 157 (1971).

8. *See, e.g.*, Clutchette v. Procunier, 497 F.2d 809 (9th Cir. 1974); Palmigiano v. Baxter, 487 F.2d 1280 (1st Cir. 1973); United States *ex rel.* Miller v. Twomey, 479 F.2d 701 (7th Cir. 1973); Adams v. Pate, 445 F.2d 105 (7th Cir. 1971); Sands v. Wainwright, 357 F. Supp. 1062 (M.D. Fla. 1973); Landman v. Royster, 333 F. Supp. 621 (E.D. Va. 1971); Sostre v. Rockefeller, 312 F. Supp. 863 (S.D.N.Y. 1970), *rev'd in part sub nom.* Sostre v. McGinnis, 442 F.2d 178 (2d Cir. 1971); Workman v. Kleindienst, 2 PRISON L. REP. 406 (1973).

9. 94 S. Ct. 2963 (1974).

10. Tobriner & Cohen, *How Much Process is "Due"? Parolees and Prisoners*, 25 HASTINGS L.J. 801, 803 (1974) [hereinafter cited as Tobriner & Cohen].

peting interests of the parties should be scrutinized to determine whether the right may be limited or qualified. Following an examination of the explicit holdings in *Wolff*, the suggested approach will be developed and applied to a variety of potential due process requirements in the context of prison disciplinary proceedings to determine what protections should be extended and in what circumstances they may be qualified.

Wolff v. McDonnell

Wolff v. McDonnell was instituted as a class action by an inmate in the Nebraska prison system, alleging that prison disciplinary procedures which could result in the loss of good time[11] violated the Fourteenth Amendment's due process clause.[12] The district court of Nebraska, considering itself bound by prior circuit authority, rejected plaintiff's procedural due process claim.[13] The court of appeals reversed,[14] holding that the due process requirements specified in *Morrissey*[15] and *Gagnon*[16] should be followed in prison disciplinary hearings.

The United States Supreme Court granted certiorari and expressly held, first, that a state prisoner's interest in disciplinary proceedings is included in the Fourteenth Amendment's due process concept of "liberty,"[17] to the extent that a prisoner faced with the loss of good time credit following alleged serious misconduct is entitled to "those minimum procedures appropriate under the circumstances."[18]

Having made this determination, the Court proceeded to delineate which procedural safeguards are constitutionally due. It reiterated its view that "[t]he very nature of due process negates any concept of inflexible procedures universally applicable to every imaginable situation."[19] In reversing the Eighth Circuit's decision that the *Morrissey-Gagnon* procedures were fully applicable in the context of prison disciplinary proceedings, the Supreme Court stated that "[f]or the

11. "Good time" is a statutory method by which an inmate can reduce his prison term, for parole purposes, through good behavior. NEB. REV. STAT. § 83-1,107 (1971). *See also* CAL. PEN. CODE § 2920 (West 1970); N.Y. CORREC. LAW §§ 803-04 (McKinney 1968).

12. 94 S. Ct. at 2973.

13. 342 F. Supp. 616, 627-28 (D. Neb. 1972).

14. 483 F.2d 1059, 1062-63 (8th Cir. 1973).

15. Morrissey v. Brewer, 408 U.S. 471 (1972).

16. Gagnon v. Scarpelli, 411 U.S. 778 (1973).

17. 94 S. Ct. at 2975.

18. *Id.*

19. *Id.* at 2977, *quoting* Cafeteria & Restaurant Workers Local 473 v. McElroy, 367 U.S. 886, 895 (1961).

prison inmate, the deprivation of good time is not the same immediate disaster that the revocation of parole is for the parolee."[20]

The *Wolff* Court proceeded, in the tradition of *Goldberg v. Kelly*,[21] to balance the competing interests of the parties in order to arrive at the minimum due process requirements necessary in prison disciplinary proceedings. It weighed the state's concern over discipline within "a closed, tightly controlled environment peopled by those who have chosen to violate the criminal law"[22] against the inmate's interest in securing a just determination of the charges against him which could result in a further restriction of his liberty.[23]

The Court concluded that in order to satisfy due process a disciplinary defendant must be given written notice of the charges against him at least twenty-four hours before the disciplinary hearing,[24] as well as, at the conclusion of the hearing, a written statement by the committee of the evidence relied on in reaching its decision. Where institutional safety might be endangered by such disclosure, certain items of evidence may be excluded from the statement.[25] The Court also held that prisoners should be allowed to call witnesses and to present documentary evidence when institutional safety or correctional goals would not be jeopardized thereby.[26]

At the same time, however, the Court concluded that confrontation and cross-examination of adverse witnesses are not constitutionally required because of the hazards they would present to institutional interests.[27] No right to retained or appointed counsel was extended, though in dictum the Court stated that an inmate should be permitted to seek the aid of a fellow inmate or staff member if the inmate is illiterate or the issue complex.[28] Finally, the Court found that the adjustment committee, comprised entirely of correctional authorities, was sufficiently impartial to satisfy the due process clause.[29] Clearly, the due process protections required by the Court are far from absolute. In each case, the prison authorities have wide latitude in granting or withholding these protections, with little opportunity on the part of the prisoner to challenge an unfavorable decision. As will be seen in the following discussion, such an amorphous set of guidelines is neither warranted nor necessary.

20. 94 S. Ct. at 2977.
21. 397 U.S. 254 (1970).
22. 94 S. Ct. at 2977.
23. *Id.*
24. *Id.* at 2979.
25. *Id.*
26. *Id.*
27. *Id.* at 2980.
28. *Id.* at 2981-82.
29. *Id.* at 2982.

Traditional Approaches to Due Process Requirements

Courts have relied on several different factors in determining what process is due in nonjudicial proceedings. Frequently, the nature or seriousness of the deprivation of liberty involved is an important consideration. This factor was obviously relied on to some extent in *Wolff*, where the Court observed that the deprivation of good time is not the same immediate disaster for the prison inmate as the revocation of parole is for the parolee.[30] Use of this approach would necessitate, however, the subjective establishment of a "pecking order" of the relative severity of different deprivations,[31] such as parole revocation, loss of employment, and suspension of a driver's license. Even absent the difficulty of "rating" the severity of the myriad kinds of deprivations, such a process would consume years of confusing litigation. Moreover, once the seriousness of each deprivation was established, additional litigation would be necessary to determine what process is due in each case.

Another suggestion has been that what process is due depends on the "type" of proceeding involved, that is, whether the hearing is administrative or judicial. This analysis rests on the assumption that there is a hierarchy of due process hearings, ranging from the lowest administrative hearings to a full-scale criminal trial, and that the due process "package" contains more protections as one moves up the hierarchy.[32] This approach ignores completely the competing interests of the parties and the complexities of the situation at hand.

The third approach, and the one relied on most frequently by the Supreme Court,[33] is to balance the competing interests of the parties. Under this approach, the interests of the individual are balanced against the interests of the party (the state or administrative agency) seeking to deprive him of his Fourteenth Amendment "liberty." The difficulty with this "test" is that it provides an individual no rights to due process at all until it has been shown that his interest in the protection outweighs that of the adverse party. This balancing approach is vague and difficult to interpret and apply, and necessitates a total case-by-case determination of minimum due process requirements.

The Substantive Nature of the Inquiry Approach

It is proposed that due process requirements which are more con-

30. *Id.* at 2977. *See also* Joint Anti-Fascist Refugee Comm. v. McGrath, 341 U.S. 123, 168 (1951) (Frankfurter, J., concurring).

31. Tobriner & Cohen, *supra* note 10, at 802.

32. *Id.* at 802-03.

33. *See, e.g.*, Wolff v. McDonnell, 94 S. Ct. 2963 (1974); Gagnon v. Scarpelli, 411 U.S. 778 (1973); Morrissey v. Brewer, 408 U.S. 471 (1972); Goldberg v. Kelly, 397 U.S. 254 (1970).

crete, understandable and easily applied can be established by using the following approach:

1. Determine the function or objective of the hearing—that is, ascertain the substantive nature of the inquiry.
2. Examine the usefulness of the due process protection being considered in relation to the objective of the inquiry, and extend the right to the protection if it is found appropriate.
3. Balance the competing interests of the parties to determine whether the right should be limited or qualified.

As suggested by Mathew O. Tobriner and Harold Cohen, the "substantive nature of the inquiry . . . fixes its attributes and characteristics"[34] and is thus a preferable starting point for determining what due process safeguards are necessary. If a hearing is primarily concerned with factfinding, for example, certain due process protections may be required which are simply not necessary in an inquiry which is predictive or dispositional. This distinction may be illustrated by an analogy to the field of criminal law. If a defendant pleads not guilty to a charge, a trial is held to determine the facts at issue—whether the accused committed the acts charged; the trial is thus primarily factfinding in nature. On the other hand, if the defendant pleads guilty, the trial is replaced by an abbreviated hearing at which the judge merely assesses the appropriate penalty; this proceeding is dispositional.

The Supreme Court has recognized, on occasion, that the hearing must be appropriate to the *nature* of the case[35] and that not all situations calling for procedural safeguards call for the same kind of protections.[36] Having so concluded, the Court has unfortunately departed from this logical starting point and determined minimum due process requirements in relation to the *factual* situation in each case without regard to the substantive nature of the inquiry at hand. This approach has tended to confuse other courts which have attempted to apply delineated minimum due process requirements to dissimilar factual situations.

It is contended that more concrete, definite due process requirements than the Court has heretofore announced are necessary to help remove the confusion not only of the courts, but also of legislators and administrators who are now being called upon to formulate rules, regulations, and policies incorporating due process requirements in various

34. Tobriner & Cohen, *supra* note 10, at 803.

35. *See, e.g.*, Bell v. Burson, 402 U.S. 535, 541 (1971); Mullane v. Central Hanover Bank & Trust Co., 339 U.S. 306, 313 (1950).

36. Morrissey v. Brewer, 408 U.S. 471, 481 (1972).

contexts.[37] As long as the Supreme Court continues with the case-by-case "facts" approach it merely stimulates litigation each time a fact situation arises which is not directly on point with a previously decided case. The "substantive inquiry" analysis, followed by a balancing of competing interests, would at least provide basic guidelines for the due process necessary in hearings which are primarily factfinding, dispositional, or predictive.[38] Although competing interests are still balanced, thus preventing the total elimination of case-by-case adjudication, the approach suggested does establish more definite due process requirements. As a result, it lessens the arbitrary use of discretion while still allowing an overriding state interest to limit or qualify the due process rights extended.

Prison Hearings and Due Process

The prison setting produces hearing procedures of several different kinds. There are, for example, parole release hearings, proceedings in which an inmate admits a violation of prison rules, and disciplinary hearings in which the inmate seeks to challenge or controvert the charges against him.[39] Applying the test just described, different due process safeguards might be required in each of these hearing situations because of the varying nature of these settings.

Parole release hearings are primarily predictive or judgmental in character: the parole board seeks to determine whether the inmate has a good chance of "making it" in the outside world on the basis of his past history, future plans, and job opportunities. A disciplinary proceeding in which the inmate has admitted his misconduct and desires to offer no mitigating or justifying facts is primarily dispositional: the appropriate institutional officer or hearing body merely imposes one of the disciplinary sanctions prescribed by statute or regulation for the violation involved.

The prison proceedings which serve as the basis for determining due process requirements in this note are those in which an inmate charged with serious misbehavior seeks to present a defense against the charges. In order to apply the substantive nature of the inquiry analysis, the nature of these proceedings must first be established. It is apparent that these particular disciplinary hearings have both dispositional and judgmental elements: if a sanction is found to be necessary, the appropriate punishment will hopefully be determined by considering the inmate's prior conduct record and the penalty which will serve the most useful purpose in furthering the inmate's rehabilitation.

37. Tobriner & Cohen, *supra* note 10, at 804.
38. *See generally id.* at 801-11.
39. *Id.* at 804.

Application of the Substantive Nature of the Inquiry Approach to Prison Disciplinary Proceedings

The primary purpose of prison disciplinary proceedings in which the inmate challenges the charges against him is a determination of facts. The ultimate issue is, of course, whether an inmate will be disciplined for misconduct. But first the hearing body must decide whether the inmate in fact committed, without mitigation or justification, the acts charged. Thus, the basic issue, and the substantive nature involved, is a determination of adjudicative facts, those which answer the questions of who, what, when, why, and where.[40] This adjudicative process performs a traditional factfinding role, analogous to a criminal trial.[41]

Once it has been established that the substantive nature of prison disciplinary hearings is to determine the facts involved in the alleged misconduct, the next step is to consider whether the particular due process safeguards under consideration would serve a useful purpose at such a hearing.[42] In other words, the safeguard sought "must be weighed in the scale of its value in affording a fair hearing as to the substance of the inquiry."[43] To this end, the particular safeguards will be discussed individually to determine whether each is necessary to a rational determination of the facts, since the emphasis of the requirements of due process is in bolstering the reliability of the factfinding procedure.[44] If the safeguards are found useful, they should be extended as due process rights in the prison disciplinary hearing context.

A determination of the efficacy of various due process protections cannot, however, be the final step in determining due process. While it is contended that the requirements must be as concrete as possible, the rigid application of these safeguards would fail to take into account the prison context itself. The necessity of maintaining security and discipline within the prison and the complex relationships between inmates themselves and inmates and correctional staff members demand that the competing interests of state and prisoner be weighed. Only after such rights as have been found appropriate have been extended will the competing administrative interests be balanced against the prisoner's rights to determine if and when the right may be limited or qualified. Only an *overriding* governmental interest will be sufficient to limit an individual's right to a particular due process protection, with

40. K. DAVIS, ADMINISTRATIVE LAW TEXT § 7.03, at 160 (3d ed. 1972).
41. Tobriner & Cohen, *supra* note 10, at 809.
42. *See id.* at 803.
43. *Id.*
44. *See* McKeiver v. Pennsylvania, 403 U.S. 528, 543 (1971).

the burden on the party (the prison authorities) seeking to curtail the individual's liberty.[45]

Notice

The giving of adequate and timely notice is an elementary and fundamental requirement of due process in any proceeding to be accorded finality.[46] The function of notice is to clarify what the charges are and to afford the charged person an opportunity to marshal the facts in his defense.[47]

Once the function of notice has been recognized, the necessity and usefulness of this due process protection in the factfinding milieu of the prison disciplinary setting are not difficult to establish. Notice is the foundation upon which the other due process safeguards, to be discussed below, rest: the disciplinary committee or board cannot properly determine the facts if only one side of the facts is presented to it. In order for both sides to reach the committee, it is essential that adequate written notice comprising the allegations against the inmate be provided. Oral notice is not sufficiently precise to satisfy the requirement and an inmate cannot refer back to it should he forget or misunderstand any of the allegations. Further, written notice of the charges should become part of the written record of the proceeding, to protect both inmate and authorities on review of the hearing or at any other time an inmate's records are reviewed.[48]

The notice should also be timely; written notice given at the beginning of the hearing would preclude the inmate from adequately preparing his defense. The notice must be timely in two respects. First, it must be given within a short time after the occurrence which is the foundation of the charges, in order that possible witnesses will not forget their observations. The notice must also be given a reasonable amount of time before the hearing so that the accused will have the opportunity to seek help in his defense and to gather witnesses or other evidence on his behalf. Written notice, given within forty-eight hours of the charged offense and at least forty-eight hours prior to the hearing would seem to satisfy these requirements.

It has been established that timely and adequate notice is not only essential to a factfinding inquiry, but is also a prerequisite to any other due process requirements. The state's interests must next be considered to determine if this safeguard may be qualified under any cir-

45. Hermann, Schwartz, Kolleeny, Campana & Harvey, *Due Process in Prison Disciplinary Proceedings*, 29 GUILD PRAC. 79 (1972).

46. Sands v. Wainwright, 357 F. Supp. 1062, 1085 (M.D. Fla. 1973).

47. *In re* Gault, 387 U.S. 1, 33-34 (1967).

48. See notes 120-24 & accompanying text *infra*.

cumstances. While the state's interests in acurately determining the facts and in preventing arbitrary treatment coincide with those of the inmate and thus appear consistent with this due process requirement,[49] there will be emergency situations in the prison context where this protection may be limited because of the necessity for maintaining institutional order and security. During actual emergency conditions caused by riots or rebellions (and not during the lock-downs which often follow such occurrences), or when a prisoner is exhibiting violent and ungovernable tendencies, an inmate may be placed in segregation or isolation prior to notice.[50] Immediately upon the quelling of the disturbance, or, in the case of an individual inmate segregated because of his violent tendencies, immediately after the prisoner has been placed in segregation, the required notice must be given.[51]

These limitations in times of emergency conditions, concededly necessary for prison security, would seemingly exhaust the situations in which summary sanctions may be imposed without prior notice and hearing. In these instances alone, the necessity for administrative discretion outweighs, and thus qualifies, the inmate's right to due process notice prior to discipline.

Witnesses and Documentary Evidence

The right to offer testimony of witnesses is the right to present the accused's, as well as the accuser's, version of the facts to the hearing body so that it may decide where the truth lies.[52] To suggest that this due process protection is not essential in a prison disciplinary proceeding is to ignore the factfinding nature of that proceeding.

The Supreme Court has recognized that the right to call witnesses in one's own defense is fundamental,[53] particularly where one challenges the charges as resting on incorrect or misleading factual premises.[54] Unless the hearing body is in possession of *all* the facts upon which its determination should rely, the issues cannot be properly and fairly decided, and arbitrary action is likely to result. This right to offer evidence other than the statement of the accused is even more important where, as in prison disciplinary proceedings, there is the added problem of an "unreliable" accused,[55] whose own statement is

49. Note, *Implications of Morrissey v. Brewer for Prison Disciplinary Hearings in Indiana*, 49 IND. L.J. 306, 309 (1974) [hereinafter cited as *Implications of Morrissey*]. See text accompanying note 96 *infra*.

50. Sands v. Wainwright, 357 F. Supp. 1062, 1091 (M.D. Fla. 1973).

51. *Id.*

52. Washington v. Texas, 388 U.S. 14, 19 (1967).

53. Chambers v. Mississippi, 410 U.S. 284, 302 (1973).

54. *See* Goldberg v. Kelly, 397 U.S. 254, 268 (1970).

55. Clutchette v. Procunier, 497 F.2d 809, 818 (9th Cir. 1974).

not likely to be readily believed. Thus, an inmate should, in the absence of countervailing state interests, be extended the fundamental and essential due process right to call witnesses and to present documentary evidence in his defense.

While it has been suggested that "institutional safety" and "correctional goals" will be disrupted if inmates are allowed to call witnesses in their defense,[56] these broad generalizations, if accepted, could be used to limit or destroy every right of prison inmates and to vest complete discretion, leading to arbitrary action, in prison administrators once again. Much more concrete arguments of compelling state interest should be found if the right to call witnesses is to be qualified.

Prison authorities do, of course, not only have a legitimate interest in maintaining order and security within the institution, they have an affirmative duty to do so. An inmate's ability to call nonvoluntary witnesses could substantially increase the risks of disruption and reprisal among the inmate population[57] by, at the very least, increasing animosity between various inmates and inmate groups. Recognition of the deleterious effects on order and security which could result if inmates were allowed to compel the attendance of witnesses in their favor leads to the conclusion that a prisoner may call only voluntary witnesses to testify on his behalf. Thus, in the case of nonvoluntary witnesses, the state interest in maintaining security and order would appear sufficient to limit an inmate's right to call witnesses in his defense.

Prison officials have also suggested that inmates would volunteer to testify solely to avoid working.[58] Such an argument is easily countered, however, since disciplinary hearings could easily be scheduled during nonwork hours.[59]

The contention that allowing testimony of witnesses on an inmate's behalf would unduly lengthen the proceedings and result in inefficiency is also untenable. The Supreme Court has said that "[p]rocedural due process is not intended to promote efficiency or accommodate all possible interests: it is intended to protect the particular interests of the person . . . ."[60] Such a maxim cannot, of course, be read as an absolute; a procedure which takes the time of the hearing body without adding to the integrity of the factfinding process would be merely wasteful.[61] However, it would seem more important to

56. Wolff v. McDonnell, 94 S. Ct. 2963, 2979 (1974).

57. *Id.* at 2988 (Marshall & Brennan, JJ., dissenting in part).

58. *Implications of Morrissey, supra* note 49, at 313.

59. *Id.*

60. Fuentes v. Shevin, 407 U.S. 67, 90 n.22 (1972). See text accompanying notes 76-77 *infra.*

61. Note, *The Evolving Right of Due Process at Prison Disciplinary Hearings,* 42 FORDHAM L. REV. 878, 886 (1974).

present all the facts to the hearing body so that a just determination can be made than to preclude such presentation on mere efficiency grounds. In any event, it is obvious that the hearing body has the inherent discretion to limit the number of witnesses called to avoid mere cumulative evidence and to restrict the scope of the testimony to matters relevant to the issues involved.[62]

In conclusion, an inmate should be allowed to call witnesses in his defense provided that such witnesses volunteer to testify. The disciplinary committee may, however, limit the number of witnesses called and the scope of the testimony in order to avoid repetition and to hear only relevant testimony.

Confrontation and Cross-Examination

In a situation in which governmental action seriously injures an individual, and the reasonableness of the action depends on findings of fact, confrontation and cross-examination must be permitted.[63] In fact, the Supreme Court has stated that "[i]n almost every setting where important decisions turn on questions of fact, due process requires an opportunity to confront and cross-examine adverse witnesses."[64] No statement, unless by special exception, should be used as testimony until it has been tested by cross-examination.[65]

In the prison setting, where jealousy, malice, and vindictiveness may motivate the assertion of serious charges, the need for the protection afforded by confrontation and cross-examination is obvious.[66] Thus, it can be argued that the due process rights to confrontation and cross-examination should certainly be extended to inmates facing prison disciplinary proceedings. These rights, like the due process requirements discussed previously, are not necessarily absolute; they may be qualified to accommodate state interests if such interests are shown to outweigh the individual's right to the safeguard.[67]

Prison authorities argue against extending to inmates the rights to confrontation and cross-examination in disciplinary proceedings. The officials contend, first, that if inmates are allowed to cross-examine prison guards the traditional relationship between guards and inmates will be eroded and the authority of prison officials will be reduced.[68]

62. *Implications of Morrissey, supra* note 49, at 313.
63. *See* Greene v. McElroy, 360 U.S. 474, 496 (1959).
64. Goldberg v. Kelly, 397 U.S. 254, 269 (1970).
65. *See* 5 J. WIGMORE, EVIDENCE § 1367 (3d ed. 1940).
66. Greene v. McElroy, 360 U.S. 474, 496 (1959).
67. Chambers v. Mississippi, 410 U.S. 284, 285 (1973).
68. Millemann, *Prison Disciplinary Hearings and Procedural Due Process—The Requirement of a Full Administrative Hearing*, 31 MD. L. REV. 27, 53 (1971) [hereinafter cited as Millemann].

However, "authority premised only on power and an avoidance of any outside scrutiny is not worth preserving, particularly at the expense of a prisoner's right to a legitimate search for truth at the hearing."[69] The notion that prison officials have absolute discretion in controlling the lives of inmates is finally dying, due in large part to judicial intervention in prison administration.[70] This antiquated idea of total discretion must be rejected when it conflicts with a vital due process right. The concern for administrative dislocation must yield when the accommodation of this interest conflicts with the necessity for implementing procedural protections to insure fundamental fairness.[71]

Correctional authorities also contend that institutional safety will be disrupted if inmate accusers are cross-examined by the accused inmate.[72] While it is true that there may be substantial risk of reprisals when inmate accusers are involved, if the accuser's identity is known, cross-examination of the accuser cannot further endanger him. By analogy, risk of reprisals exists in criminal trials. In that situation the accused is generally in a much better position to reach and harm his accuser; yet few would suggest that the right to confrontation and cross-examination be curtailed because of this speculative risk. The safety of inmates does not justify the wholesale denial of the right to confront and cross-examine. It is the duty of the correctional authorities to protect testifying inmates without interfering unnecessarily in the fairness and reliability of disciplinary hearings.[73]

In the situation where the identity of the inmate accuser is unknown to the accused inmate (and these instances will be few since the great majority of charges made against inmates are initiated by guards),[74] the state's interest in institutional order and safety poses a more difficult dilemma. While confrontation and cross-examination of an "informant" would be of great value to the accused and might bring to light the pressure put on inmates by guards to inform on others, the identification of an "informant" would concededly increase the danger of reprisals or repercussions by the accused inmate or his friends. At this point the state's interests do appear to override those of the accused inmate, and here his right to confront and cross-examine may be denied. It has been strongly contended, however, that in such a case

69. Wick, *Procedural Due Process in Prison Disciplinary Hearings: The Case for Specific Constitutional Requirements*, 18 S.D.L. REV. 309, 324 (1973) [hereinafter cited as Wick].

70. See text accompanying note 1 *supra* & note 124 *infra*.

71. Clutchette v. Procunier, 497 F.2d 809, 819 (9th Cir. 1974).

72. Sands v. Wainwright, 357 F. Supp. 1062, 1088 (M.D. Fla. 1973).

73. Clutchette v. Procunier, 497 F.2d 809, 819 (9th Cir. 1974).

74. Wolff v. McDonnell, 94 S. Ct. 2963, 2990 (1974) (Marshall &_ Brennan, JJ., dissenting in part).

the hearing committee has the affirmative duty to probe the credibility of the "informant" *in camera.*[75]

Another argument that correctional authorities could make against allowing the rights of confrontation and cross-examination would be that such rights would result in longer and less manageable hearings. The argument is no more convincing here than it was in the discussion of the right to call witnesses:[76] "the Constitution recognizes higher values than speed and efficiency."[77] Of course, cross-examination would, at the discretion of the hearing body, be limited to matters relevant to the subject matter at issue, in order to prevent rambling questioning which would result in unduly long hearings without adding to the integrity of the hearing process.[78]

The final contention that has been advanced to justify the denial of confrontation and cross-examination is that such rights would interfere with the disciplinary process as a component of the rehabilitative process.[79] Whether prison officials themselves accept this contention as true in the face of logic and authority, is, at best, questionable. "[P]unishment, unless fairly and justly imposed, will not only fail to serve as a deterrent to similar conduct but will also counter efforts at rehabilitation."[80] The government must show a "scrupulous concern for 'fairness' and 'equal justice' if those convicted are to be reconciled with the system."[81] Fair treatment at the hands of others leaves an inmate with no choice but to recognize his own misconduct.[82] This reflection must surely be the basis for any real rehabilitation, though rehabilitative programs are, of course, also essential to implement and channel an inmate's changed perspective and to aid in his reintegration into society. Since society as a whole, as well as the state and the prisoner himself, has a stake in restoring the inmate "to a normal and useful life within the law,"[83] it is patent that fairness in disciplinary hearings, which must normally include the rights of confrontation and cross-examination, is essential for rehabilitation.

75. Palmigiano v. Baxter, 487 F.2d 1280, 1290 (1st Cir. 1973).

76. See text accompanying notes 60-61 *supra.*

77. Fuentes v. Shevin, 407 U.S. 67, 90 n.22 (1972).

78. *See generally* Note, *The Evolving Right of Due Process at Prison Disciplinary Hearings,* 42 FORDHAM L. REV. 878, 886 (1974). See text accompanying note 62 *supra.*

79. *See* Wolff v. McDonnell, 94 S. Ct. 2963, 2980-81 (1974).

80. Hermann, Schwartz, Kolleeny, Campana & Harvey, *Due Process in Prison Disciplinary Proceedings,* 29 GUILD PRAC. 79, 88 (1972). See text accompanying notes 101-04 *infra.*

81. McGee, *Blacks, Due Process and Efficiency in the Clash of Values as the Supreme Court Moves to the Right,* 2 BLACK L.J. 220, 230 (1972).

82. Millemann, *supra* note 68, at 59; Comment, *Criminal Law—Procedural Due Process for Intra-prison Disciplinary Hearings: An Arkansas Analysis,* 27 ARK. L. REV. 44, 63-64 (1973).

83. Morrissey v. Brewer, 408 U.S. 471, 484 (1972).

In short, the rights to confrontation and cross-examination must be extended to inmates facing disciplinary hearings except when the identity of an *inmate* accuser is unknown to the accused. In those instances, however, the disciplinary committee must probe the informant's credibility.

Legal Assistance

The necessity and usefulness of providing an accused with assistance in his defence seems barely problematical.[84] Since in prison disciplinary proceedings the adjudicatory process performs a role analogous to a criminal trial, its setting is the milieu in which lawyers have traditionally operated: a prisoner is charged with the violation of a prison rule and the determination of the facts will depend on testimony and presentation of circumstantial evidence.[85]

Johnson v. Avery[86] established the right of inmates to render legal assistance to fellow prisoners where the state provided no alternative source of legal aid.[87] The decision was premised on the consideration that many inmates are illiterate and simply unable to represent themselves adequately.[88] By analogy, an inmate without legal training requires at least as much assistance in preparing a defense and cross-examining witnesses as is necessary for composing a writ or petition which can be copied from available formbooks. In *Gagnon v. Scarpelli* the Supreme Court stated that "[t]he unskilled or uneducated probationer or parolee may well have difficulty in presenting his version of a disputed set of facts where the presentation requires the examining or cross-examining of witnesses or the offering or dissecting of complex documentary evidence."[89] Again, the analogy to inmates is clear.

Once the conclusion has been reached that the nature of the proceeding requires that an accused inmate have the right to some assistance in preparing his defense, all that remains is to determine what kind of assistance must be made available. While the Fifth Amendment to the United States Constitution requires that an accused be given counsel at a criminal trial, prison disciplinary proceedings, although basically similar, are not criminal trials;[90] appointed counsel at

84. "Assistance" is used in this context to refer to nonprofessional assistance, that is, assistance from one who is not an attorney, such as a paralegal, another inmate, or a law student. "Counsel" or "formal counsel" refers to members of the bar.

85. Tobriner & Cohen, *supra* note 10, at 809.

86. 393 U.S. 483 (1969).

87. *Id.* at 489-90.

88. Millemann, *supra* note 68, at 55.

89. 411 U.S. 778, 787 (1973).

90. Tobriner & Cohen, *supra* note 10, at 809.

such proceedings is not constitutionally required. Where, however, the charges against the inmate are to be referred for criminal prosecution, the right to counsel would seem constitutionally protected as the inmate faces complex problems of self-incrimination in each situation.[91]

Although appointed counsel is thus not required, the question still arises whether an inmate may retain an attorney for disciplinary proceedings. The possibility of retained counsel where appointed counsel is not required has been upheld by the Supreme Court in at least one other context,[92] and by a lower court in a prison case.[93] This approach seems to be more equitable than an "all or nothing" approach. However, it would appear that permitting retained counsel involves serious equal protection problems unless other types of assistance are provided for those inmates without the resources to retain an attorney.

Three possibilities other than appointed or retained members of the bar remain as means of assistance to inmates: fellow inmates, law students or legal paraprofessionals, and members of the institutional staff.[94] Most prisons house inmates who, although not formally trained in the law, have amassed large amounts of informal legal training while incarcerated. These inmates must be allowed to assist an accused inmate in preparing his defense, on a voluntary basis. In addition, law students or legal paraprofessionals could be utilized in the capacity of counsel-substitutes to aid an inmate in the presentation of his defense. The use of institutional staff presents obvious problems and should be avoided unless there is no other assistance to be found. The staff member would have the same difficulties in being impartial as do prison officials sitting on the hearing boards.[95] Furthermore, staff members would seldom have either the interest or the necessary background in law to be of real assistance to the inmate.

The state and the inmate have similar interests in securing a just and nonarbitrary determination of the facts.[96] The necessity of providing assistance should be curtailed only if the state's other interests are of such magnitude as to override this necessity. The state may contend that inserting inmate assistance into the disciplinary procedure will result in that procedure taking on an adversary cast. But "[i]t is simply illogical to conclude that prison disciplinary hearings are non-adversarial."[97] The disciplinary committee is faced with determining whether

91. Clutchette v. Procunier, 497 F.2d 809, 822-23 (9th Cir. 1974).

92. Goldberg v. Kelly, 397 U.S. 254, 270 (1970) (termination of welfare benefits).

93. Sands v. Wainwright, 357 F. Supp. 1062, 1089 (M.D. Fla. 1973).

94. *Id.*

95. See text accompanying notes 106-13 *infra.*

96. See text accompanying note 49 *supra.*

97. Millemann, *supra* note 68, at 49; Comment, *Federal Court Intervention in*

an inmate is guilty of the alleged misconduct which is violative of prison rules. Thus, the very nature of the proceeding is adversarial and giving an inmate assistance in meeting the challenge to his liberty does not add to this adversarial nature. Furthermore, the Supreme Court has concluded that even if a proceeding is nonadversarial, due process protections are required.[98]

Another state interest to consider is that adding assistance might well result in delays and practical problems. It is true that, were formal counsel required, practical difficulties in providing sufficient counsel and paying for their services might constitute a substantial burden on the state's resources.[99] However, formal counsel is not required, and any delays that the due process requirement of nonprofessional assistance might occasion could be minimized by an effective program of providing such assistance. The inmate's interest in receiving assistance in the preparation of his case greatly outweighs what little delay might remain, particularly in view of the fact that efficiency is not the purpose or objective of the disciplinary hearing.[100]

It was also suggested in *Wolff* that the introduction of formal counsel into the proceedings would "tend to reduce their utility as a means to further correctional goals."[101] Although the Court was referring only to counsel, it seems likely that most prison officials would view any form of assistance as equally disruptive. Exactly what this type of argument purports to contend is difficult to pinpoint, but probably the argument rests on the "rehabilitation" and "deterrence" theories.[102] No better way has been found for generating the feeling that justice has been done than to give a person in jeopardy of grievous loss the opportunity to meet the case against him.[103] Only when an inmate knows that justice has been done and he has received fair treatment will he be forced to "square his conduct with himself."[104] And

State Prison Internal Disciplinary Hearings to Guarantee Fourteenth Amendment Procedural Due Process, 17 WAYNE L. REV. 931, 943 (1971).

98. *See In re* Gault, 387 U.S. 1 (1967) (juvenile court proceeding).

99. *See* Wolff v. McDonnell, 94 S. Ct. 2963, 2992 (1974) (Marshall & Brennan, JJ., dissenting in part).

100. See text accompanying notes 60-62, 77 *supra*.

101. *See* 94 S. Ct. at 2981. The Court did give a qualified right to assistance by other inmates. An inmate who is illiterate or who is faced with complex issues may have a right to assistance from a more knowledgeable inmate; if he is not allowed to seek such assistance himself, a fellow inmate or staff member should be appointed by prison officials.

102. See text accompanying notes 79-83 *supra*.

103. Joint Anti-Fascist Refugee Comm. v. McGrath, 341 U.S. 123, 171-72 (1951) (Frankfurter, J., concurring).

104. Comment, *Criminal Law—Procedural Due Process for Intraprison Disciplinary Hearings: An Arkansas Analysis*, 27 ARK. L. REV. 44, 63-64 (1973).

similarly, the goal of deterrence by punishment can only be achieved if the punishment is fairly and justly imposed.

To summarize, counsel should be provided an inmate facing disciplinary action if the alleged misconduct is to be referred to other authorities for criminal prosecution. Otherwise, retained counsel or counsel-substitute, in the form of fellow prisoners, law students, or legal paraprofessionals must be made available to the inmate facing possible grievous loss.

Impartial Hearing Body

A " 'neutral and detached' hearing body"[105] would appear to be essential in the context of factfinding inquiries such as prison disciplinary proceedings. The very purpose of a detached hearing body is to decide fairly the factual issues involved without bias toward, or prejudice against, either of the parties. Without an impartial factfinder the other due process requirements would have form but little substance since the hearing body would tend to decide the outcome of the proceeding by following its own bias rather than by resolving the disputed facts presented by both parties. Thus, the interests of both the state and the prisoner in the fair and just determination of the facts can be accomplished only by an impartial hearing body. Consequently, prisoners facing deprivations at a disciplinary hearing must be accorded the right to an impartial and detached factfinder.

The problematic aspect of this right is not, however, whether an impartial hearing body is necessary, but rather, what constitutes such an impartial body. It is obvious that a prison official who reported the alleged violation or who investigated it cannot be permitted to serve on the committee.[106] Similarly, staff members who will be called as witnesses should not sit on the committee.[107] These persons are too closely related to the factual dispute involved: it would be unrealistic to expect them to divorce themselves sufficiently from their involvement to become impartial.

The Supreme Court held in *Wolff*[108] that, barring the individuals discussed above, a committee composed entirely of prison officials will satisfy the due process requirement of a neutral and detached hearing body.[109] While it may be true that correctional authorities have the

105. Morrissey v. Brewer, 408 U.S. 471, 489 (1972).

106. *See, e.g.*, Clutchette v. Procunier, 497 F.2d 809, 820 (9th Cir. 1974); United States *ex rel.* Miller v. Twomey, 479 F.2d 701, 716 (7th Cir. 1973); Landman v. Royster, 333 F. Supp. 621, 653 (E.D. Va. 1971).

107. Clutchette v. Procunier, 497 F.2d 809, 820 (9th Cir. 1974).

108. Wolff v. McDonnell, 94 S. Ct. 2963 (1974).

109. *Id.* at 2982. *See also* Sands v. Wainwright, 357 F. Supp. 1062, 1085 (M.D. Fla. 1973).

experience and expertise to qualify them to serve,[110] it is also true that such officials naturally tend to accept the word of the accusing guard.[111]

A hearing body consisting solely of prison officials simply does not and cannot meet the due process requirement. Even if it were conceded that most prison officials would make a good faith effort to comply with the requirement of impartiality,[112] they cannot be expected to divest themselves of subconscious prejudices and antipathies toward inmates nor to overcome their tendencies to give more weight to the statement of a guard simply because he is a part of the correctional system. An impossible burden is placed upon prison authorities who are permitted to be the only factfinders; such a situation is also inherently unfair to the accused inmate. It is unrealistic to contend that those who promulgate the rules and regulations, who daily enforce them, and who view enforcement as an important goal can possibly be objective in this setting. Such a situation is akin to having a police chief serve as the sole judge during the trial of a person arrested by one of his officers. "Too many subtle and direct influences combine to eliminate the possibility of a prison official serving as a truly independent arbiter."[113]

At the opposite end of the spectrum, it has been suggested that in order to satisfy due process, the hearing committee must be composed entirely of persons not charged with caring for prisoners or administering the institution.[114] While this solution seems reasonable and equitable on the surface, it does not adequately deal with the realities of the prison setting. A committee composed entirely of "outsiders" would undoubtedly lead to more objective factfinding.[115] However, it would be difficult for such a committee to weigh the subjective factors in the inmate's records and behavior in the institution context in choosing a sanction tailored to the rehabilitative needs of the individual inmate.[116]

When all the circumstances surrounding prison disciplinary proceedings have been taken into account, it appears that a hearing body composed of both prison officials and "outsiders" would be as impartial as is constitutionally required,[117] and might well increase inmate confi-

110. *See* Sands v. Wainwright, 357 F. Supp. 1062, 1085 (M.D. Fla. 1973). In any case this recognition of officials' expertise should not be overdone, for the result is over-reliance on officials' discretion.

111. Wick, *supra* note 69, at 313; *Implications of Morrissey, supra* note 49, at 315.

112. *See* Sands v. Wainwright, 357 F. Supp. 1062, 1085 (M.D. Fla. 1973).

113. Wick, *supra* note 69, at 324.

114. *Id.*

115. *Implications of Morrissey, supra* note 49, at 315.

116. *Id.*

117. *See* Millemann, *supra* note 68, at 55.

dence in the disciplinary process[118] by removing from prison officials the total discretion customarily enjoyed by them in determining the facts. A "mixed" board increases the chances for objective factfinding without sacrificing the correctional goal of rehabilitation.[119]

There appear to be no state interests which would outweigh the inmate's due process right to an impartial, "mixed" hearing body. "Outsiders" on the committee would neither lengthen the hearing nor make it less manageable. Institutional order and security would not be disrupted; the use of some "outsiders" would free staff members to continue at their usual jobs within the institution.

Rehabilitative goals would not be impeded by the utilization of "mixed" disciplinary committees. On the contrary, a truly impartial board would, in the long run, undoubtedly further the rehabilitative process *and* add to institutional order and security by alleviating disruptons which might occur when inmates feel they have been unjustly dealt with by an arbitrary hearing body. Finally, the state might save money by using volunteers from among public-minded citizens on the hearing body. If any additional costs *were* incurred for compensating these "outsiders," these costs would seem insufficient to be balanced realistically against the inmate's right to an impartial hearing body.

Written Statement of Findings

A written statement by the hearing body indicating the evidence relied on in reaching its determination and the reasons for the disciplinary sanction imposed (if any) serves several useful functions in a factfinding inquiry. Such a statement helps insure that the disciplinary committee will act fairly.[120] The statement also comprises, as does notice, an important part of the written record of the hearing, an essential consideration when review procedures of the hearing itself are provided. When an inmate's records are being reviewed for other purposes, such as transfer to another institution or parole release, it is equally important that the basis for the decision be adequately stated in order to "protect the inmate against collateral consequences based on a misunderstanding of the nature of the original proceedings."[121] Thus, it would seem that the inmate has a due process right to a written statement of the evidence relied on by the disciplinary committee and the reasons for any disciplinary action taken.

Since extending to the inmate the right to receive a written statement is neither costly nor inefficient, the state's interests in practicality

118. *Implications of Morrissey, supra* note 49, at 315-16.

119. *Id.* at 315.

120. Wolff v. McDonnell, 94 S. Ct. 2963, 2979 (1974). See text accompanying note 48 *supra.*

121. 94 S. Ct. at 2979.

and efficiency are not infringed by providing the right.[122] Furthermore, the right in no way interferes with the rehabilitative process.[123]

The only state interest which may, in a few instances, override the inmate's interest in this due process protection is that of institutional order and security. In situations where an unknown inmate accuser has provided the committee with information, inclusion of the accuser's name in the written statement of evidence would have the same potentially disruptive effect on institutional order and security as would confrontation and cross-examination of the unknown accuser by the accused. In these cases, it would seem that the name of the accuser could be deleted from the statement of evidence relied on; the evidentiary facts relied on, however, should be included. The disciplinary committee should also include the fact that it probed the accuser's credibility, as well as its findings as to that credibility. The inclusion of such information will make the statement, as well as the evidence actually relied on, as reliable and complete as possible. Only in the situation of the unknown inmate accuser should the right to a complete statement of evidence depended on be limited. In all other cases the written statement should contain all the evidence relied on by the fact-finder in reaching its decision.

Conclusion

The only way to limit the absolute discretion traditionally enjoyed by prison administrators in this country's correctional systems is to impose clear restraints upon their actions. Without such restraints the prisons will remain the private domains of the correctional officials; the result, the continuation of arbitrary action, not only runs counter to rehabilitative goals but also can lead to massive and brutal rebellions by the prisoners themselves.

With the demise of the judicial "hands-off" doctrine by which courts consistently deferred to the judgment and discretion of prison authorities, some restraints have finally been placed on correctional officials to prevent their interference with constitutionally protected rights such as freedom of religion and freedom from cruel and unusual punishment. Unfortunately, however, when faced with an aspect of prison administration as potentially disastrous to inmates as disciplinary proceedings, the United States Supreme Court, in *Wolff v. McDonnell*, again chose to defer to administrative discretion, stating that the Court "should not be too ready to exercise oversight and put aside the judgment of prison administrators."[124]

122. See text accompanying notes 60-61, 76-78, 99 *supra*.
123. See text accompanying notes 79-83, 101-04 *supra*.
124. 94 S. Ct. at 2979.

The only unqualified due process protection afforded by the *Wolff* Court is the right of the inmate to receive notice of the charges against him. Moreover, although the opinion ostensibly entitles the prisoner to receive a written statement of the evidence relied on by the hearing body, the court held that items of evidence might be excluded upon an official determination that personal or institutional safety would be jeopardized by disclosure. Similarly, in considering other due process protections, the Court apparently bowed to traditional notions of the need for institutional control over prison disciplinary proceedings. As a result, it vested broad discretion in the prison officials, limited only by such generalized notions as institutional safety and correctional goals.

Thus, the holding in *Wolff v. McDonnell* "deprives an accused inmate of any enforceable constitutional right to the procedural tools essential to the presentation of any meaningful defense, and makes the required notice and hearing formalities of little utility."[125] The Court, in balancing the competing interests of the inmate and the prison administrators, virtually ignored the inmate's interests by allowing "sound discretion" and administrative efficiency to override such fundamental due process protections as the right to call witnesses and to confront and cross-examine adverse witnesses.[126]

While it is conceded that the complexities of the prison setting preclude the possibility of eliminating all administrative discretion, such discretion must be exercised only in narrowly defined situations. The substantive nature of the inquiry approach, followed by a balancing of competing interests, establishes concrete due process requirements which can be limited only in those instances in which the magnitude of the state interest compels the exercise of discretion by prison authorities.

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125. *Id.* at 2987 (Marshall & Brennan, JJ., dissenting in part).
126. *Id.* at 2989.
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